IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

UNITED STATES OF AMERICA,	**)**	
VS.	**)**	**CR-97-H-159-E**
REGINALD WOODS.	**)**	

ORDER

The court has before it a motion (Doc. #90-1) of defendant Reginald Woods filed September 14, 2006 seeking pursuant to 18 U.S.C. § 3600 a new DNA test on a white ski mask (Trial Exhibit #44) found in the alleged get-away car associated with a robbery of America's First Credit Union in Talladega, Alabama on May 8, 1995. Attached to the motion as an exhibit is another motion (Doc. #90-2) which is a copy of the motion (Doc. #63) filed by Woods November 13, 1967 seeking to set aside the jury verdict based upon newly discovered evidence. Page four of Doc. # 90-2 is a report of examination by the FBI, dated October 8, 1997, of two specimens taken from the ski mask for comparison of DNA samples for defendant, his co-defendant William Frances Stephens and a man named Bobby Baker, an unindicted subject of federal investigations of a series of bank robberies in Alabama, including those in this criminal prosecution. The handwriting on that

report of examination, as well as that on the other documents filed September 14, 2006, is presumably that of defendant Reginald Woods.

The court also has before it a document (Doc. #91) filed September 14, 2006 entitled "NOTICE TO PRINCIPLES IS NOTICE TO AGENTS NOTICE TO AGENTS IS NOTICE TO PRINCIPLES." Page two of Doc. #91 is entitled "WARNING AND NOTICE" and page three is entitled "GLOSSARY OF TERMS AND PENALTIES." The court knows of no court proceeding relevant to Doc. #91 filed September 14, 2006 and does not view that document as raising an issue before the court or being relevant to any such issue. The court also has before it, as contemplated by 18 U.S.C. § 3600, a document (Doc. #92) entitled "AFFIDAVIT OF ACTUAL INNOCENCE AND FORMAL COMPLAINT."

The court proceedings relevant to the September 14, 2006 filings (Doc. #90-1, #90-2 and #92) which may present a justiciable issue are fully set out in an order (Doc. #64), filed November 13, 1997, following the September 8, 1997 verdicts of guilty (Doc. #s 39 through 47), and following the filing by the government on October 22, 1997 of a disclosure (Doc. #60) of newly discovered information. The October 8, 1997 report of examination, which is page four of Doc. #90-2 of Woods' September 14, 2006 filing, was the "newly disclosed information" and pertained to government trial exhibit #44, a which ski mask

found in an abandoned stolen Oldsmobile used in the May 8, 1995 robbery in Talladega, Alabama. The November 13, 1997 order (Doc. #64), also filed prior to the November 14, 1997 imposition of sentence, was a denial of Woods' November 13, 1997 motion (Doc. #63) to set aside the jury verdicts based upon the newly discovered information revealed by the government in the October 22, 1997 disclosure (Doc. #60). The November 13, 1997 order (Doc. #64) is so relevant to the matters currently before the court that, rather than simply referring to it and rather than attaching a copy of it to this order, the court will set forth now, verbatim, the entire November 13, 1997 order (Doc. #64) (the footnotes are actually footnotes in that order):

ORDER

On September 8, 1997 a jury returned against both defendants verdicts of guilty of four offenses under 18 U.S.C. § 2113(a)(d) [Counts 2, 4, 6 and 9], four offenses under 18 U.S.C. § 924(c)(1) [Counts 3, 5, 7 and 10] and one offense under 18 U.S.C. § 2119 [Count 1] contained in a ten-count indictment filed May 29, 1997 charging defendants Woods and Stephens with those nine offenses.[1] On October 22, 1997 the United States of America filed a disclosure of newly discovered information. The newly discovered information concerned laboratory results received by the United States Attorney on October 17, 1997 from DNA tests conducted at the FBI laboratory on

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[1] Count 8 of the indictment which charged only defendant Stephens was dismissed on September 2, 1997 on motion of the government immediately prior to trial.

two samples taken from a ski mask and three saliva samples which had been forwarded to the laboratory prior to trial. The three saliva samples were supplied from defendants Stephens and Woods as well as another subject of the investigation. The laboratory results were promptly provided to counsel for defendants which resulted in the filing on November 12, 1997 and November 13, 1997 of motions by defendant Stephens and defendants Woods, respectively, for a new trial based on newly discovered evidence.[2]

In order to prevail on a motion for a new trial filed under Fed. R. Crim. P. 33 based on newly discovered evidence, a movant must establish that (1)the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result. The failure to satisfy any single one of the foregoing is fatal to a motion for new trial. United

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[2] Since the results of the DNA test were not available until over a month after the jury verdicts, it is clear that the results were not withheld from defendants. It is not significant whether the United States Attorney had prior to trial advised defendants' attorneys that the, DNA test had been requested. The court observes, however, that in all probability such information was provided counsel for defendants. In the first place, defendants Woods and Stephens provided saliva samples to the government and that activity certainly alerted counsel to the prospect of a DNA examination. On August 26, 1997 counsel for defendant Stephens filed six separate motions to hire experts and one of those motions (document 27) expressly requested funds to hire an expert in the field of DNA testing. Finally, defendant Stephens' August 26, 1997 motion advised the court that his attorney had been advised by the government of its intent to use DNA test results at trial. That intent never came to fruition since the test results were not available until long after the trial. On the same day that the motions were filed by Stephens, the court granted them by authorizing an expenditure not exceeding $2,000 for such experts. It is interesting to note that no expert testimony was offered during the trial by defendant Stephens.

States v. Schlei, 122 F. 3rd 944 (llth Cir. 1997). Quite clearly the first three elements have been satisfied, but neither the fourth nor the fifth elements are satisfied because the court is certain that there is no reasonable probability[3] that, had the DNA test results been available and utilized by defendants at trial, the results regarding Counts 6 or 7 (the counts directly related to the ski mask) or regarding any of the remaining seven counts would have been different.

As noted earlier, Counts 2, 4, 6 and 9 charged defendants with four separate armed bank robberies while putting in jeopardy the life of another person by the use of a dangerous weapon. The robberies occurred on separate days but the Counts 2, 4 and 6 robberies occurred at approximately 9:15 a.m. while the Count 9 robbery occurred later in the morning. The robberies under Counts 2, 4 and 6 were carried out by two men while the robbery under Count 9 was carried out by three men. In all four robberies the men were armed, one of them fired a round into the ceiling, one of them told everyone to get on the floor while the other robber vaulted over the counter demanding money. The robbers in all four robberies were heavily disguised wearing gloves, boots, heavy army-like clothing and a variety of tight-fitting masks or hats. One of the robbers in all four robberies counted out loud backward from approximately 60, appearing to be counting seconds, and when approximately 10 was reached yelled in essence that it was time to go. The robbers in all four robberies fled in a stolen vehicle, in each instance abandoning it nearby.[4]

The ski mask which was the subject of the DNA testing was found in an abandoned stolen Oldsmobile used in connection with the Count 6 robbery. Four principal witnesses were called with regard to that robbery which involved America's First Credit Union in Talladega,

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[3] A "reasonable probability" is a probability sufficient to undermine the confidence in the outcome.

[4] The method of robbing the banks is almost identical to the method utilized by defendants during bank robberies which are the subject of their convictions in the United States District Court for the Middle District of Alabama on January 23, 1997.

> Alabama on May 8, 1995. Two of them, Sherry Bowie and Anthony Arnold, were eye witnesses to the robbery. A third witness, Connie Foshee, described seeing the stolen Oldsmobile prior to the robbery parked near a Dempsey Dumpster along with a nearby 300ZX vehicle associated with defendants. Following the testimony of those witnesses a Talladega police officer, Leon Thomas, testified that he found the stolen Oldsmobile several blocks from the bank after the robbery and found its license plates near the Dempsey Dumpster about which Foshee had testified. Detective Thomas further identified Government Exhibit 44 as a white ski mask found in the getaway car following the robbery. It is this ski mask which was the subject of the DNA test and that test failed to connect either defendant to two samples taken from the ski mask. The test results indicated the presence of DNA from more than one individual and the specimen from a third individual was not excluded as one of the potential contributors to the two samples taken from the mask.
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> The evidence of guilt of both defendants of all nine offenses was overwhelming - it is difficult to imagine a stronger circumstantial evidence presentation. Because of the head-to-toe costume disguise utilized, there was essentially no eye witness identification, but the court is satisfied that the totality of the evidence proved both defendants guilty, as charged, beyond a reasonable doubt. The DNA test results were not available until a month after trial, but had those results been available to defendants prior to trial, the court is totally satisfied that the same verdicts would have resulted. There is simply no reasonable doubt about defendant's guilt as to each count, whether or not the DNA test results are considered. Accordingly, both motions for a new trial based on newly discovered evidence are DENIED.

On October 27, 1997, which was forty-four days after the return of the verdicts of guilty, the government filed the disclosure (Doc. #60) of the October 8, 1997 FBI report of the results of the DNA tests conducted at an FBI laboratory comparing three known DNA specimens from three persons with five

specimens of DNA taken from the white ski mask (Gov. Trial Exhibit #44), which report was the subject of the foregoing November 13, 1997 order (Doc. #64). A copy of that FBI report of examination (with handwritten notes presumably added defendant Woods) is attached as Doc. #90-2 and is a part of the motion (Doc. 90-1) filed September 14, 2006, which is currently pending before the court. In the documents filed September 14, 2006, defendant Woods states (and the court has no reason to question) that a person named Bobby Baker gave DNA specimen K1, co-defendant Stephens gave DNA specimen K3 and he gave DNA specimen K5. As noted in the November 13, 1997 order denying the motion for a new trial (Doc. #64), the report concludes that Woods and Stephens "can be excluded as contributing to the DNA specimen Q12-4 and Q12-5" but that Bobby Baker "cannot be excluded as one of the potential contributors to the mixture of DNA specimen Q 12-4 and Q 12-5." The report also reveals "that typing procedures were attempted on specimens Q 12-1, Q 12-2 and Q 12-3 but "the results of those tests were inconclusive." Following the imposition of sentence (Doc. #68) on Woods on November 14, 1997, he filed a notice of appeal (Doc. #73) to the United States Court of Appeals for the Eleventh Circuit. In his challenge of his conviction and sentencing, Woods argued that this court erred in denying (Doc. #64) his motion (Doc. #63) for a new trial based upon the newly discovered

evidence contained is the post-verdict disclosure (Doc. #60). The Court of Appeals, in an unpublished opinion filed November 4, 1998 in its Docket Number 97-6936, rejected this argument and affirmed Woods' conviction. That opinion issued as the Court's mandate on December 7, 1998, was filed in this court on December 9, 1998 (Doc. #87).

Section 3600 of Title 18 expressly authorizes a person under a sentence of imprisonment for a federal offense to file a motion for DNA testing of specific evidence and directs the court, after finding that specified conditions exist, to order the testing. As applicable to this case, and the September 14, 2006 motions, Woods must satisfy each of the following ten specified requirements before the requested order for testing would be appropriate:

> (1) The movant must assert, under penalty of perjury, that movant is actually innocent of the offense which caused him to be imprisoned;
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> (2) The specific evidence to be tested must have been secured in relation to the investigation of the federal offense;
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> (3) The specific evidence sought to be tested was previously subjected to DNA testing and the movant is requesting a re-testing using a new method or technology that is substantially more probative than the prior DNA testing;
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> (4) The specific evidence to be tested is in the possession of the Government and has been subject to the chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing;

(5) The proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices;

(6) The movant must identify a theory of defense that would establish the actual innocence of movant of the offense which caused him to be imprisoned (the court notes that Woods raised no affirmative defense at trial so he need not have concerned himself with demonstrating such theory is not inconsistent with an affirmative defensive presented at trial);

(7) The identify of the perpetrator was at issue in the trial;

(8) The proposed DNA testing of the specific evidence may produce new material evidence that would raise a reasonable probability that movant did not commit the offense;

(9) The movant certifies that he will provide a DNA sample for purposes of comparison; and

(10) There is a rebuttable presumption that the motion is made in a timely fashion, but such presumption may be rebutted upon any one or more of four specific "findings" by the court enumerated in the statute.

Requirements (1), (2), (7) and (9) are clearly satisfied. Also, Woods is entitled to the rebuttable presumption under requirement (10). And simply by "parroting" the statute, he has satisfied requirement (3). As to requirement (4), Woods certainly need not satisfy this requirement at this time in order further to pursue his motion. But he has totally failed to satisfy requirements (5), (6) and (8).

In satisfying requirement (3), Woods, *in haec verba* § 3600(a)(3)(B), has done nothing to inform the court of information it needs to determine if requirement (5) has been satisfied. The motion fails to set forth the methods to be used in the

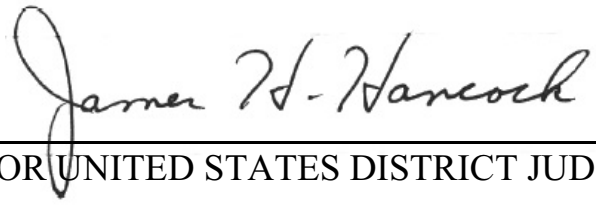
proposed testing or to provide sufficient information to enable the court to determine whether that testing (a) is reasonable in scope, (b) uses scientifically sound methods, or (c) and consistent with accepted forensic practices. Even were the court to overlook at this time such failure to satisfy requirement (5), it cannot overlook his total failure to satisfy requirement (6)(B) which required him to identify a theory of defense that would establish his actual innocence of the Count 6 robbery on May 8, 1995 in Talladega, Alabama.

The FBI report eliminated Woods as a contributor to two of the five specimens tested but, as to the other three specimens tested, the results were inclusive. Woods argues that a new test will eliminate him with regard to the "inconclusive" results in the report for the three specimens, thereby "establishing absolute doubt" regarding his guilt. But a theory which eliminates Woods' connection with the white ski mask, even if it firmly connects Bobby Baker to the mask, does not rise to the level of identifying a theory which would establish Woods' actual innocence as required by requirement (6). Further, such a theory, if established by the requested retesting, also would fall far, far short of raising a reasonable probability that Woods did not commit the Count 6 robbery, as required by requirement (8)(B). A simple review of the evidence of his guilt set out is the November 13, 1997 order (Doc. #64), quoted previously, compels the conclusion

that Woods was involved in the Count 6 robbery, even if Baker were also involved. A third person was involved in the Count 9 robbery and could easily have been also involved in the Count 6 robbery, or, for that matter, in the Counts 2 and 4 robberies, but simply not as visible in those three robberies.

For the foregoing reasons, the September 14, 2006 motion (Doc. #9-1) seeking to pursue a new DNA test on Trial Exhibit #44 is **DENIED**. Inasmuch as the September 14, 2006 filings do not reflect that a copy was "served"on the government, the Clerk of Court is **DIRECTED** to forward a copy of Doc. #s 90, 91 and 92, along with a copy of this order, to the United States Attorney for the Northern District of Alabama. Her attention is specifically directed to 18 U.S.C. § 3600(b).

DONE this the 26th day of September, 2006.



SENIOR UNITED STATES DISTRICT JUDGE